B

v.

THE QUEEN

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE,
DAWSON AND GAUDRON JJ.
[F.C. 92/054]
22 DECEMBER 1992

EVIDENCE: Similar fact evidence - Tendered by accused - Purpose for which evidence was tendered - Whether can be used for different purpose - Complainant underaged - Trial Judge giving direction to jury on corroboration - Whether direction proper - Whether there was usurption of functions of jury by Judge.

The applicant was convicted on three counts of sexual indecency with his daughter. The applicant adduced evidence of a previous conviction for sexual indecency against the same daughter in order to show that the present complaint was a fabrication and that the alleged acts of indecency complained of in fact related to the previous conviction.

The trial Judge gave a direction to the jury that the prior conviction was capable of amounting to "strong" corroboration of the daughter's evidence. The question that arose was whether the directions given by the Judge had left the jury with an adequate opportunity of giving effect to the defence.

Held:

Per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ.

[1] A trial Judge has a broad discretion in commenting on the facts and in choosing the strength of the language employed in commenting on the facts, but the comments must stop short of overawing the jury. It must exhibit a judicial balance so that the jury is not deprived of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence.

[2] Reading the summing-up as a whole, the general directions given by the Judge were insufficient to overcome the erroneous and prejudicial direction that "what I tell you is, that is very strong corroboration if you accept it and there is no reason why you should not accept it, coming from his own lips".

Per Mason CJ, Brennan and Deane JJ.

The evidence of prior acts of indecent assault was admissible to prove the offences charged and the fact that the applicant tendered the evidence for an exculpatory purpose did not preclude the use of the evidence to prove those offences.

Per Dawson and Gaudron JJ.

[1] The trial Judge was not called upon to decide whether the applicant's previous convictions showed no more than the existence of a criminal propensity or disposition on his part or whether it established the existence of a relationship between the applicant and his daughter which pointed strongly in the direction of his guilt.

[2] The trial Judge was in error in directing the jury that the evidence of the applicant's previous offences was capable of amounting to corroboration. The evidence was not tendered for that purpose, it was not admitted for that purpose and could not be used for that purpose.

[Appeal allowed. Conviction set aside. New trial ordered].

Cases referred to:

Reg. v. Straffen [1952] 2 QB 911 ***(refd)***
Director of Public Prosecutions v. Boardman [1975] AC 421, p. 457 & p. 452 ***(refd)***
R. v. Ball [1911] AC 47 at p. 71 ***(refd)***
Broadhurst v. The Queen [1964] AC 441 at p. 464 ***(refd)***
Green v. The Queen [1971] 126 CLR 28 at p. 34 ***(refd)***
Stokes v. The Queen [1960] 105 CLR 279 at p. 284 ***(refd)***
Reg. v. Hulse [1971] 1 SASR 327 at p. 335 ***(refd)***
Walker v. Walker [1937] 57 CLR 630, at pp. 636, 638 ***(refd)***
R. v. Finlayson [1912] 14 CLR 675, at p. 679 ***(refd)***
R. v. Bond [1906] 2 KB 389, at pp. 411 - 412 ***(refd)***
Maxwell v. The Director of Public Prosecutions [1935] AC 309 at p. 321 ***(refd)***
Makin v. Attorney-General for New South Wales [1894] AC 57 at p. 65 ***(refd)***
Reg. v. Sims & Anderson [1967] Qd R. 432 at p. 439 ***(refd)***
Perry v. the Queen [1982] 150 CLR 580 at pp. 604 - 605, 609 - 610 ***(refd)***
Sutton v. The Queen [1984] 152 CLR 528 at pp. 534, 547 - 548, 560, 564 - 565 ***(refd)***
Hoch v. The Queen [1988] 165 CLR 292 at pp. 294 - 295, 300 ***(refd)***
Harriman v. The Queen [1989] 167 CLR 590 at pp. 593 - 594, 597 ***(refd)***
R. v. Kennewell [1927] SASR 287 at p. 302 ***(refd)***

Donnini v. The Queen [1972] 128 CLR 114 ***(refd)***
Reg. v. O'Meally (No. 2) [1953] VLR 30 [1972] 128 CLR at p. 125 ***(refd)***
Plomp v. The Queen [1963] 110 CLR 234 at pp. 242, 249 ***(refd)***
Mutual Life Insurance Co. of New York v. Moss [1906] 4 CLR 311 at p. 317 ***(refd)***
Kelleher v. The Queen [1974] 131 CLR 534 esp. at p. 553 ***(refd)***
Reg v. Manning [1968] 53 Cr. App. R. 150 at p. 153 ***(refd)***
Bromley v. The Queen [1986] 161 CLR 315 ***(refd)***
Director of Public Prosecutions v. Kilbourne [1973] AC 729 at p. 740 ***(refd)***
Longman v. The Queen [1989] 168 CLR 79 at p. 86 ***(refd)***
Pollitt v. The Queen [1992] 66 ALJR 613 at p. 630; 108 ALJ 1 at p. 33 ***(refd)***
Reg. v. Pahuja [1987] 49 SASR 191 at p. 216 ***(refd)***
Dossi [1918] 13 Cr. App. R. 158 at p. 161 ***(refd)***
Director of Public Prosecutions v. Hester [1973] AC 296 at p. 325 ***(refd)***
Reg. v. Morgan [1978] 1 WLR 735 ***(refd)***
Thompson v. The Queen [1989] 169 CLR 1 at pp. 15 - 16 ***(refd)***
Willis v. Bernard [1832] 8 Bing. 376, at p. 383 ***(refd)***
McKeon [1986] 31 A. Crim. R. 357 ***(refd)***
Shepherd [1980] 71 Cr. App. R. 120, at pp. 123, 124 ***(refd)***

Legislation referred to:
Evidence Act 1971, ss. 71, 76F(1)(2)(3)(a)(b)

Other sources referred to:
Cross on Evidence, Aust. ed. [1991] par. 1535
Wells, Evidence and Advocacy [1988] pp. 80 - 82
Wigmore on Evidence, rev. ed. [1983] vol. 1, par. 13
Archbold on - Pleading, Evidence and Practice in Criminal Cases, 44th ed. [1992] vol. 1, par. 13 - 58

For the applicant - Porter Pilkinton
For the respondent - Director of Public Prosecutions

JUDGMENT

Mason CJ:
I would grant special leave to appeal for the reason given by Brennan J. and I would allow the appeal on the ground that the trial Judge misdirected the jury as to the manner in which they were to regard the applicant's evidence of his prior acts of sexual indecency with his daughter.

That evidence, if it had been led by the prosecution, would have been relevant to prove the applicant's guilt of the offences charged on the basis either that the prior acts were similar acts *Reg. v. Straffen* [1952] 2 QB 911; *Director of Public Prosecutions v. Boardman* [1975] AC 421, per Lord Cross of Chelsea at p. 457 or that they evidenced that the applicant had an unnatural and abnormal passion for his daughter *R. v. Ball* [1911] AC 47, at p. 71 (evidence of a sexual relationship between brother and sister at an earlier period admitted to prove incest on or between the dates charged); *Director of Public Prosecutions v. Boardman* [1975] 1 AC, per Lord Hailsham of St Marylebone at p. 452. Indeed, Counsel for the applicant in this Court did not contend that the evidence was inadmissible on a similar fact basis or that it was incapable of amounting to corroboration. But at the trial Counsel for the prosecution did not rely on the evidence either in support of the prosecution case or as corroboration. Nonetheless, the trial Judge regarded the prior sexual acts as admissible to prove the existence of an unnatural sexual passion and as corroborative of evidence of the applicant's guilt of the offences charged.

True it is that the trial Judge would have been entitled, had the prosecution sought to adduce the evidence of the prior sexual acts, to exclude that evidence on the ground that its probative value was outweighed by its prejudicial effect. However, the existence of that power of exclusion is a theoretical consideration in this case because the applicant tendered the evidence, an important element of his defence being that his daughter had made false allegations with a view to taking advantage of his past conduct. The applicant would not have sought to exclude the evidence had it been tendered in the prosecution case.

Once the prior convictions were admitted into evidence they could be used by the jury as evidence tending to establish the applicant's guilt of the offences charged. There was not, in my view, any basis on which the trial Judge could legitimately instruct the jury that they were not evidence tending to establish guilt or were not capable of being corroborative when they had that probative value, despite their prejudicial effect.

On the other hand, the trial Judge was called upon to direct the jury with some care. The existence of the prior convictions left the applicant extremely vulnerable to the possibility of irresponsible allegations on the part of an unscrupulous daughter that he had resumed his previous unlawful conduct. Consequently, it was for the trial Judge to stress to the jury that they must be satisfied beyond reasonable doubt that he had in fact done so before they could convict the applicant. An evaluation of

the daughter's evidence and that of the applicant was critical on this aspect of the case. The tendency of the prior convictions to establish guilt and their capacity to provide corroboration should not have been allowed to overshadow the jury's need to be satisfied to the required degree on the daughter's evidence that the applicant had committed the offences charged. The similarity of the prior acts and the earlier existence of the unnatural and abnormal passion for his daughter might assist the jury in coming to that conclusion but their probative value depended very much on the nature and the details of the evidence given by the applicant and his daughter. It was essential that the jury be directed that, if they were to convict the applicant, they must consider the evidence of the daughter with care and be satisfied beyond reasonable doubt that the applicant had committed the offences as charged. They were entitled to regard the applicant's prior convictions which had been introduced into evidence by him as probative or corroborative and ought to have been so directed. But, because the extent of the probative or corroborative value of these convictions depended critically on the details of the other evidence in the case, the trial Judge ought to have avoided with scrupulous care usurping the jury's role in assessing the extent to which the applicant's prior convictions corroborated the daughter's evidence or otherwise incriminated the applicant. The primary incriminating evidence was that of the daughter and the effect of the trial Judge's direction was to understate the extent to which the jury ought to have subjected it to scrutiny.

What I have just said lends weight to the criticism of the adequacy of the judge's directions to the jury as to the manner in which they could use the evidence of prior sexual acts but it does not support the view that the Judge should have directed the jury that the convictions were not evidence of guilt or were not capable of corroborating the prosecution case.

In the result, I would grant special leave to appeal and allow the appeal.

Brennan J:

The applicant (the Accused) was charged on indictment before the Supreme Court of the Australian Capital Territory with committing acts of indecency upon and having sexual intercourse with his daughter who was 16 years of age at the time of the trial. The learned trial Judge gave the jury a warning that it was unsafe to convict on the uncorroborated evidence of the daughter. The warning related to the danger of convicting on the uncorroborated evidence of the victim of a sexual offence. Section 76F(2) of the Evidence Act 1971 (ACT) now precludes the giving of such a warning but, as the warning given by the learned trial Judge favoured the Accused, the failure to comply with s. 76F(2) gives no ground for quashing the Accused's conviction. His Honour did not give a warning that it was unsafe to convict the Accused on the uncorroborated evidence of a child though he was free to give such a warning having regard to s. 76F(3)(b). Counsel for the Accused submitted in this Court that his Honour was obliged to give a warning pointing out the dangers of acting on a child's evidence, but I respectfully agree with Dawson and Gaudron JJ. that, in the circumstances of this case, it was open to the trial Judge to abstain from giving such a warning. The absence of such a warning gives no ground for quashing the conviction when the circumstances did not require it.

When his Honour gave the warning that it was dangerous to convict on the uncorroborated evidence of the daughter, he was constrained to give the jury a direction on corroboration. In giving them that direction, his Honour said:

> Well, I tell you as a matter of law that there is - that you may find this is very strong corroboration in this case. It is a matter for you, but the evidence of corroboration, which you may regard as corroboration, is the Accused's own evidence of his having committed acts of indecency of the very type alleged against him now and of his having done that prior to July 1984 when he was charged and pleaded guilty in the Magistrate's Court. ...
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> You may think it is difficult to conceive of stronger corroboration of an allegation of a sexual offence than the admission of the Accused that he had previously committed indecent acts of the very nature of which he is now charged upon the same person; it seems to be very strong corroboration indeed.

Later, his Honour said:

> (I)ndependent evidence coming from the Accused, himself, which tends to show sexual desire for the victim, and some measure of gratification of that desire, supports the case for the prosecution because it is consistent

> with the allegations that the Accused now faces and makes unlawful and unnatural behaviour credible; it explains the whole thing. And it may serve to allay any concern that the jury - you - may be having that (the daughter's) allegation is a fabrication. How much weight you attach to it is for you. But what I tell you is, that is very strong corroboration if you accept it and there is no reason why you should not accept it, coming from his own lips.

The jury might have understood that, provided they accepted the Accused's evidence of his earlier acts of indecent dealing - and every consideration favoured acceptance - they were bound to regard that evidence as strong corroboration of the daughter's allegations. But it was for the jury to say whether the evidence of prior acts of indecent dealing was "very strong corroboration." True it is that the Accused's evidence of those prior acts set the background in which the jury were to evaluate the daughter's evidence and it removed some of the natural reserve that the jury might otherwise have felt in accepting an allegation that the Accused had indulged an abnormal passion for his daughter. But the evidence of the prior acts of indecent dealing had an equivocal character when the central issue in the trial was whether the Accused, having been charged and convicted on his own confession of the prior acts, had returned home repentant and had fallen victim to false allegations by a rebellious daughter exploiting his past conduct or whether, after returning home, he had earned her antipathy by continuing his indecent treatment of her. The evidence was capable of being regarded by the jury either as an explanation of the daughter's alleged concoction of charges against her father **or** to show the unnatural relationship existing between the Accused and his daughter. So much was conceded in this Court. The Accused tendered the evidence, inviting the jury to use it for the former purpose; the prosecution, once the evidence was in, were entitled to invite the jury to use it to establish the truth of the daughter's present allegations. In the passages cited from his Honour's directions to the jury, his Honour might have been understood as dismissing the Accused's case that, because his daughter resented her father and the domestic discipline to which she was subject, she was concocting her current allegations.

Although his Honour's summing up was, in general, adverse to the Accused, he directed the jury that all questions of fact were for them to determine and he gave an appropriate direction as to the onus and standard of proof. Nevertheless, a reading of the summing up raises in my mind the question whether the jury was left with an adequate opportunity of giving effect to the defence.

A trial Judge has a broad discretion in commenting on the facts and in choosing the strength of the language employed in commenting on the facts, but the comment must stop short of overawing the jury *Broadhurst v. The Queen* [1964] AC 441 at p. 464. It must exhibit a judicial balance *Green v. The Queen* [1971] 126 CLR 28 at p. 34 so that the jury is not deprived "of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence" *Stokes v. The Queen* [1960] 105 CLR 279 at p. 284. I agree with the observations of the Full Court of the Supreme Court of South Australia in *Reg. v. Hulse* [1971] 1 SASR 327 at p. 335:

> (T)o use the words of the Privy Council in *Broadhurst's* Case [1964] AC at p. 464, there is a danger of the jury being overawed by the Judge's views, where, even though the jury are told that the decision on the facts is for them, the language of the Judge is so forceful that they may be under the impression that there is really nothing for them to decide or that they would be fatuous or disrespectful if they disagreed with the Judge's views.

Whether his Honour went too far in deprecating the defence case gained by reading the summing up as a whole *Green v. the Queen* [1971] 126 CLR, at p. 34. The Full Court of the Federal Court held the summing up as a whole could not have "left (the jury) in any confusion about their role or how they should go about deciding whether they accepted the evidence of the complainant to the extent necessary to found a conviction". I regret that I am unable to share that view.

The summing up focused the jury's attention on the issue that the daughter's evidence should be corroborated. His Honour directed the jury that corroboration of the evidence of alleged victims of sexual offences is sought because "people do sometimes tell ... a story which is very easy to fabricate and extremely difficult to refute". By saying to the jury that the evidence of prior acts of indecent dealing was "very strong corroboration", his Honour might well

have given them to understand that they should regard that evidence as strongly negativing the possibility that the daughter's allegations were fabricated. That understanding would have been reinforced by a direction given towards the end of the summing up in response to a point made by the Accused's Counsel that the prior acts of indecent dealing would not have been known to the jury but for the Accused's own evidence. His Honour said:

> (T)he way it was put to you is but for his admissions, you would never have known about it. What I tell you, ladies and gentlemen, is that is wrong. In this case, that is wrong. Evidence of prior association, of prior guilty conduct between the prosecutrix, complainant, victim, call it whatever you like in a sexual case, and the Accused, is evidence to show the nature of the relationship.
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> ... It is not right to say to you that you would never - but for his admissions, you would never have known about it. It is simply not correct. And indeed in her evidence, the girl told you that these three incidents were not simply isolated incidents in the periods that are charged, that it happened whenever her mother went out. That would have been perfectly admissible evidence in the absence of any evidence from the Accused about it.
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> So it is not correct to put to you, and I would not raise it myself, but Counsel raised it and I am obliged to correct something which was wrong in his address to you.

The legal admissibility of evidence of prior acts of indecent dealing did not really touch the point that the evidence had been given by the Accused, not tendered against him by the prosecution.

In the course of the summing up, the daughter's evidence was commended to the jury; the Accused's evidence went unremarked. Reading the summing up as a whole I am unable to regard the general directions given by his Honour as sufficient to overcome the erroneous and prejudicial direction that "what I tell you is, that is very strong corroboration if you accept it and there is no reason why you should not accept it, coming from his own lips". If the jury were going to acquit, they would have had to be impervious to the influence of the summing up.

The case raises a special leave point as to the need to give a particular kind of warning when evidence is given by a child of relatively mature years as to facts which she might reasonably be taken to apprehend, remember and recount with accuracy. I would grant special leave to appeal to consider that point but the ground on which I would allow the appeal is that his Honour misdirected the jury the manner in which they were to regard the Accused's evidence of his prior acts of indecent dealing.

However, I do not go so far as to hold, and I would not allow the appeal on the ground, that the jury should have been directed that they could not regard the Accused's evidence of prior acts of indecent dealing as tending to prove the case against him. An Accused, seeking to tender evidence admissible for more than one purpose, cannot restrict the purposes to which that evidence can lawfully be put. Indeed, a party may be required to tender evidence which he does not wish to tender for **any** purpose and, once tendered, it becomes a medium of proof of matters to which it is relevant *Walker v. Walker* [1937] 57 CLR 630, at pp. 636, 638. When evidence is properly admissible for two or more purposes, it can be used, once admitted, for any or all of those purposes *R. v. Finlayson* [1912] 14 CLR 675, at p. 679; **Cross on Evidence**, Aust. ed. [1991], par. 1535; **Wells, Evidence and Advocacy** [1988], pp. 80-82. Jelf J. in *R. v. Bond* observed [1906] 2 KB 389, at pp. 411 - 412:

> (I)t often happens, both in civil and criminal cases, that evidence is tendered on several alternative grounds, and yet it is never objected that if on any ground it is admissible, that ground must not prevail, because on some other ground it would be inadmissible and prejudicial.

Restrictions on the purposes to which evidence can be put arise when evidence is admissible only for a limited purpose. If evidence, admitted for one purpose, is not admissible for another purpose, it cannot be used for that other purpose **Wigmore on Evidence**, rev. ed. [1983], vol. 1, par. 13; *Maxwell v. The Director of Public Prosecutions* [1935] AC 309, at p. 321. Even though the Accused's evidence disclosed his previous acts of indecent dealing with his daughter in order to support his defence, that evidence was capable of being "very potent corroboration and very incriminating", as the learned trial Judge said. Evidence of the commission of offences other than the offence charged is *prima facie* inadmissible, but evidence of other offences usually, evidence of the

conduct constituting the offences rather than the fact of conviction: see **Shepherd** [1980] 71 Cr. App. R. 120, at pp. 123, 124 may be admitted if the evidence is relevant to a fact in issue *Makin v. Attorney-General for New South Wales* [1894] AC 57, at p. 65; and see, for example, *Reg. v. Sims & Anderson* [1967] Qd R. 432, at p. 439 and if its probative force is sufficiently high to outweigh the inevitable prejudice flowing from the nature of the evidence *Perry v. the Queen* [1982] 150 CLR 580, at pp. 604 - 605, 609 - 610; *Sutton v. The Queen* [1984] 152 CLR 528, at pp. 534, 547 - 548, 560, 564 - 565; *Hoch v. The Queen* [1988] 165 CLR 292, at pp. 294 - 295, 300; *Harriman v. The Queen* [1989] 167 CLR 590, at pp. 593 - 594, 597. Here, once the Accused chose to tender the evidence and the learned trial Judge admitted the evidence of his prior acts of indecent dealing, that evidence was available to prove the Accused's sexual attraction towards his daughter *R. v. Ball* [1911] AC 47; *R. v. Kennewell* [1927] SASR 287, at p. 302; Pettman, cited **Archbold, Pleading, Evidence and Practice in Criminal Cases**, 44th ed. [1992], vol. 1, par. 13 - 58. The evidence, once admitted, was treated as available to be used for that purpose. When an objection was taken at the trial to the prosecutor's cross-examination of the Accused about his prior relationship with his daughter, the learned trial Judge ruled against the objection saying:

> (I)t seems to me ... that the Crown is entitled to investigate the depth of the previous relationship. I do not think I can stop this cross-examination. I will allow it on that basis, that is it - the depth of the previous relationship is relevant to whether the girl's allegations now are true or not.

The evidence was, if the jury chose so to regard it, strongly supportive of the truth of the daughter's current allegations.

The case is quite dissimilar from *Donnini v. The Queen* [1972] 128 CLR 114. In that case, evidence of prior convictions was not admissible for any purpose save to impeach *Donnini's* attempt to establish good character. That evidence would not have been probative of the offence of armed robbery for which *Donnini* then stood charged. The Court was therefore concerned with the exercise of a statutory discretion to permit cross-examination of an Accused to prove his prior convictions when the jury might wrongly have regarded such evidence as relevant to prove the Accused's guilt of the offence charged. Barwick CJ said *ibid.*, at p. 123 that, if the circumstances of the case warranted allowing the cross-examination, the jury should be told -

> quite clearly that the fact of prior conviction can only be used as a means of discrediting the Accused in respect of which he is in conflict in his evidence with witnesses for the Crown, or as to exculpatory facts or claims which he makes. Where the evidence of prior convictions or of bad character or tendencies is properly admitted for other purposes, it may be that a clear statement of the use to be made of the evidence for those purposes may suffice.

In the context in which this passage appears, it is clear that his Honour, by referring to evidence "admitted for other purposes", was referring to evidence which is **admissible** for other purposes, not to the **purposes of the party tendering the evidence**. His Honour went on to discuss *R. v. Kennewell* and *Reg. v. O'Meally (No. 2)* [1953] VLR 30 in terms which show that he was directing his attention to the "purpose for which the evidence could be used" [1972] 128 CLR, at p. 125, not to the purpose for which the tendering party intended the evidence to be used. In this case, the evidence of prior acts of indecent dealing was admissible to prove the offences charged and the fact that the Accused tendered the evidence for an exculpatory purpose did not preclude the use of the evidence, once admitted, to prove those offences. To adopt Wigmore's words *op. cit.*, p. 694, the evidence satisfied "all the rules applicable to it in that capacity". The learned trial Judge would have been in error to direct the jury that the evidence was not to be regarded in determining whether the Accused was guilty of the offences charged when the evidence was capable of being strongly supportive of the daughter's allegations. If the Judge had directed the jury that the evidence could not be used to prove the charges in the indictment, he would have mis-stated the significance of the evidence (see the comparable situation considered by Menzies J. in *Donnini* [1972] 128 CLR at p. 133). Indeed, he would have been inviting the jury to act irrationally. Juries are happily accustomed to ignore invitations of that kind.

There was no error in his Honour's allowing the jury to regard the evidence of previous convictions as tending to prove the offences with

which the Accused was then charged; but, in my opinion, there was error in his depriving them of a real opportunity to regard that evidence as relevant to the proof of the daughter's mendacity. That is the error which makes it necessary to allow the appeal, set aside the conviction and order a new trial.

Deane J:
I agree with the judgment of Brennan J. and would grant special leave and allow the appeal for the reasons which he gives. I add some comments for myself.

The evidence that the applicant had committed acts of sexual indecency upon his infant daughter in the past was, in my view, admissible against him on his trial for similar acts of sexual indecency which he had allegedly committed upon the same daughter while she was still under sixteen years. Once that evidence was adduced, the jury was entitled to use it against, as well as for, the applicant. It was, on any approach, the key to an assessment of the relationship between the applicant and the daughter and, as such, constituted part of the essential background against which both the daughter's and the applicant's evidence of the alleged offences necessarily fell to be evaluated (see, e.g., *Plomp v. The Queen* [1963] 110 CLR 234, at p. 242. Particularly in a context where the applicant was accused of unnatural acts (see, e.g., *Mutual Life Insurance Co. of New York v. Moss* [1906] 4 CLR 311, at p. 317; *Plomp v. The Queen* [1963] 110 CLR, at p. 249, it was capable of being seen by the jury as important evidence of motive, namely, sexual gratification. The jury was also entitled to accept it as providing corroboration of the daughter's evidence: it supported the truth of the allegation which was implicit in the whole of the daughter's evidence, namely, that the applicant entertained an unnatural passion for her. Finally, once the applicant had himself adduced evidence of his earlier serious criminal convictions, the jury was, pursuant to the express provisions of s. 71 of the Evidence Act 1971 (ACT), entitled to take that evidence of his bad character in relation to sexual matters into account on the question whether the applicant was guilty of the offences with which he was charged.

The fact that the applicant himself adduced the evidence that he had been convicted of, and was truly guilty of, those earlier acts of indecency upon his daughter meant that no question arose about whether the evidence should, in the circumstances of the case, be excluded on discretionary grounds because of its highly prejudicial nature. Neither the fact that the Crown had earlier indicated that it did not propose to lead the evidence nor the fact that the applicant relied upon it for the purposes of his own case had the effect that the jury was obliged to disregard the legitimate significance of the evidence. That legitimate significance was as proof of the applicant's motive and unnatural passion, as corroboration of the evidence of the daughter or as evidence which the jury were entitled to take into account generally on the question whether he was guilty of the offences with which he was charged. It is simply not open to an accused in a criminal trial to lead evidence on the basis that the jury can use it for the purposes for which the Accused leads it but cannot use it as evidence, and as corroboration of prosecution evidence, of his guilt. Nor can an accused make the use of evidence as corroboration of other prosecution evidence impermissible as a matter of law by moulding his own case in a way which admits the truth of the evidence but seeks to gain advantage from it. It would, for example, be absurd if the corroborative significance of a confessional statement could be removed by the Accused moulding his own case in a way which included a positive assertion that the confessional statement had been made as a result of threats by the real culprit.

Not surprisingly, the trial Judge was not specifically asked by the Crown to rule that the evidence of the applicant's earlier acts of indecency upon his daughter could be used as evidence against him. In circumstances where the Crown was not seeking to lead further evidence of the applicant's bad character, no ruling to that effect was necessary. Once the evidence of the applicant's prior sexual offences upon his daughter was led by the defence, the jury was entitled to take account of it for all legitimate purposes.

Dawson and Gaudron JJ:
The applicant was convicted in the Supreme Court of the Australian Capital Territory upon the following three counts:

1. That between 1 December 1985 and 31 December 1986 he committed an act of

indecency upon his daughter who was then a person above the age of 10 years but under the age of 16 years.

2. That between 1 January 1987 and 31 December 1987 he engaged in sexual intercourse with the same daughter who was then a person above the age of 10 years but under the age of 16 years and who was to his knowledge his lineal descendant, namely, his daughter.

3. That between 1 January 1987 and 2 December 1988 he committed an act of indecency upon the same daughter who was then a person above the age of 10 years but under the age of 16 years.

His subsequent appeal to the Full Court of the Federal Court was dismissed.

The daughter who was the subject of the counts was born on 29 April 1974. In relation to the first count, she gave evidence that after a Christmas party in 1985 the applicant had her try on some of her mother's underclothes consisting of red high-cut underpants and a red bra. She said that the applicant stuffed some socks down the front of the bra and told her that she would look like that when she was older. She said that the applicant touched her on the breasts and the vagina while she was naked.

In relation to the second count, the daughter said that in 1987, when she was 13 years of age and in year 7 at high school, the applicant had her take off her underpants and placed his fingers inside her vagina.

In relation to the third count, the daughter gave evidence that in 1987 or 1988 the applicant called her into his bedroom, chopped off some of her pubic hair and some of his, put both in an envelope and said: "Now, we will always be together". She said that at the time the applicant had his pants down, exposing his penis, and touched her on the breasts and the vagina.

In December 1984 the applicant had pleaded guilty to charges of acts of indecency upon the same daughter. The acts of indecency included touching the daughter on the breasts and in other areas and inserting his finger in her vagina. When interviewed by the police concerning the allegations which were the basis of those charges, the applicant had admitted them. On 19 December 1984 he was sentenced to a term of imprisonment for two years which was suspended upon his entering into a recognizance in the sum of $2,000 to be of good behaviour for three years. The applicant was also ordered to accept treatment and counselling from a psychiatrist. From the time he was interviewed by police in July 1984 in relation to the 1984 allegations until about 18 November 1984 the applicant "was not allowed to approach the family" and ceased to live in the family house. On about 18 November 1984 he received a telephone call from the daughter in question asking him to come home. He did so.

In the present proceedings the applicant pleaded not guilty and gave evidence on oath. He denied the incidents of which the daughter gave evidence. He said that incidents similar to those alleged in the first two counts had occurred in or before 1984. In particular, he said that an incident involving his wife's underwear took place before 1984. He admitted pleading guilty to the charges in 1984 and gave evidence of the acts of indecency involved.

The applicant said that the daughter became difficult to control from about 1986 or 1987 and it was mainly her mother who attempted to discipline her. He said that she would have outbursts ending up with the usual accusation: "He is still doing it." He said that the daughter made threats to the effect: "It needed a phone call to bring you home and it may take a phone call to take you away again."

In cross-examination the daughter admitted that in 1984 she had rung the applicant and told him that he could come home. She admitted that she told no one of the incidents alleged to have occurred after 1984 until about December 1988 when she complained to a school counsellor. She admitted that when she was subsequently interviewed by the police on 2 December 1988 she denied that her father had inserted his finger in her vagina. She said that she did so because she was too scared and embarrassed but that she went back to the police on 2 March 1989 and told them that "he did put his fingers inside me". When asked in cross-examination the daughter at first denied that she ever threatened the applicant but subsequently admitted, when confronted with her statement to the police, that she had told them:

> I used to threaten dad like last year - I used to threaten dad, and that because of the past I used to kind of bring that up and say, 'Dad if

you do this I will do this again'. I will complain and cops will get involved and you will go away again', and so he used to get angry and that and then had fights and that.

After the prosecutor had opened his case to the jury, the learned trial Judge asked him whether he was going to lead evidence of the applicant's previous convictions. The prosecutor had not opened that evidence and informed the trial Judge that he would lead only the evidence which he had opened. The prosecutor said that he imagined that evidence relating to the prior convictions would be led by the applicant's Counsel "because that is his defence". The trial Judge confirmed with the prosecutor that he was "not going to lead similar fact evidence".

The trial Judge in his charge to the jury gave the following direction:

> Now, a lot has been said to you about the need for corroboration. Now, I have to give you a direction of law about corroboration in this case, which is a sexual case involving a child. I am required to warn you that it is unsafe to convict a person charged with a sexual offence on the uncorroborated sworn evidence of a child. What you have to determine is whether - first of all - whether there is any corroboration of the sworn evidence of (the daughter). If there is, then you could ignore that warning because you would be entitled to convict on the sworn evidence of (the daughter) supported by the corroborative evidence.
>
> I cannot see any reason why you would not accept the corroborative evidence, but if you did not, for some reason accept the evidence of corroboration, which I am going to tell you about, then you would have to have regard to the warning that it is unsafe to convict on the uncorroborated sworn evidence of a child. First of all, I tell you what corroboration is, and it is what you would expect it to be. It is some in dependent testimony, that is, independent of the child which affects the Accused by connecting him, or tending to connect him with the crime and which confirms in some material particular not only the evidence that the crime has been committed but also that the Accused committed it, and it varies.
>
> ...
>
> Well, I tell you as a matter of law that there is - that you may find (there) is very strong corroboration in this case. It is a matter for you, but the evidence of corroboration, which you may regard as corroboration, is the Accused's own evidence of his having committed acts of indecency of the very type alleged against him now and of his having done that prior to July 1984 when he was charged and pleaded guilty in the Magistrate's Court. The acts which he admitted were those of touching (the daughter's) breasts and putting his finger in her vagina in the period between 18 April and 21 July 1984.
>
> You may think it is difficult to conceive of stronger corroboration of an allegation of a sexual offence than the admission of the Accused that he had previously committed indecent acts of the very nature of which he is now charged upon the same person; it seems to be very strong corroboration indeed. Incidentally, it appears from his cross-examination, that he also admitted to police having her touch his penis and masturbate him, and he has told you that those answers to police were true.
>
> You may think it helpful if I endeavour to identify the rationale of the rule of practice which requires the jury to be warned of the danger of convicting on the uncorroborated testimony of the victim of a sexual offence. That rationale is that, as a matter of common experience, people do sometimes tell an entirely false story, a story which is very easy to fabricate and extremely difficult to refute. Therefore, the traditional wisdom is: it is wise for juries to be warned that they should look for independent evidence.
>
> But independent evidence coming from the Accused, himself, which tends to show sexual desire for the victim, and some measure of gratification of that desire, supports the case for the prosecution because it is consistent with the allegations that the Accused now faces and makes unlawful and unnatural behaviour credible; it explains the whole thing. And it may serve to allay any concern that the jury - you - may be having that (the daughter's) allegation is a fabrication. How much weight you attach to it is for you. But what I tell you is, that is very strong corroboration if you accept it and there is no reason why you should not accept it, coming from his own lips.
>
> The plain evidence from the Accused himself of the prior sexual conduct of which he pleaded guilty is very potent corroboration and very incriminating so far as these present allegations are concerned, which (the daughter) now makes. Nevertheless, I say again, you should scrutinise her evidence with special care, and if after giving her evidence that special scrutiny you are satisfied that she is thoroughly reliable, you can act upon her evidence without any corroboration, but as I have already told you, there is very substantial corroboration of her story from his own admitted guilty conduct towards her in the few years earlier.

At the conclusion of the summing up, Counsel for the applicant objected that the prior convictions were only admissible for the purpose relied upon by the defence, the Crown having specifically declined to lead similar fact evidence. The trial Judge declined to redirect the jury.

Section 76F of the Evidence Act 1971 (ACT) provides, so far as is relevant:

> (1) Any rule of law or practice requiring the corroboration of evidence or requiring the Judge to give a warning to the jury in criminal proceedings to the effect that it is unsafe to convict a person on uncorroborated evidence is abolished in so far as the rule applies to or in relation to evidence given by the complainant in the trial of a person for a prescribed sexual offence.
>
> (2) Nothing in this section shall affect the right of the Judge in prescribed sexual offence proceedings to comment on any evidence that may be unreliable but the Judge shall not, in such proceedings, give a warning to the jury to the effect that it is unsafe to convict the accused person on the uncorroborated evidence of the complai-nant.
>
> (3) Nothing in this section affects the operation of any rule of law or practice which requires -
>
> (a) ...
>
> (b) a Judge, on the trial of any person, to give the jury a warning to the effect that it is unsafe to convict a person on the uncorroborated sworn evidence of a child.

The offences with which the applicant was charged and subsequently convicted were all "prescribed sexual offences" for the purposes of s. 76F.

The trial Judge appears to have confused two separate rules of practice requiring the jury to be warned about the danger of convicting upon uncorroborated evidence. The first is the rule (now either abolished or modified by statute in most States) that in cases involving sexual offences the trial Judge should warn the jury that it is dangerous to convict on the uncorroborated testimony of the complainant. If that warning is given it should be accompanied by a direction that if, after scrutinizing the testimony with great care and paying heed to the warning, the jury are satisfied of its truth and accuracy, then they may act upon it (see *Kelleher v. The Queen* [1974] 131 CLR 534, esp. at p. 553). The reason for the practice of giving the warning is generally expressed in terms first suggested by Salmon LJ in *Manning's* Case (*Reg. v. Henry; Reg v. Manning* [1968] 53 Cr. App. R. 150, at p. 153), namely, that complainants in sexual cases do sometimes tell "an entirely false story which is very easy to fabricate, but extremely difficult to refute". This was the reason ascribed by the trial Judge for giving the warning which he gave in this case. But, in so far as cases of prescribed sexual offences are concerned, s. 76F(1) abolishes the rule of practice which required a warning to be given and s. 76F(2) prohibits the Judge from giving it

The second rule of practice to which the trial Judge may have intended to refer is that which requires a similar warning to be given where the witness is a young child who gives sworn evidence. There is also a third category of witnesses, namely, accomplices, in respect of whose evidence the common law requires such a warning to be given. And there are, of course, cases which do not fall within any particular category but in which a warning should be given - for instance, where in a criminal trial a witness has some mental disability which may affect his capacity to give reliable evidence (see *Bromley v. The Queen* [1986] 161 CLR 315). But the recognized categories should not be regarded as closed (see *Director of Public Prosecutions v. Kilbourne* [1973] AC 729, at p. 740; *Longman v. The Queen* [1989] 168 CLR 79, at p. 86). The evidence of prison informers, for example, may perhaps now be regarded as another recognized category (see *Pollitt v. The Queen* [1992] 66 ALJR 613, at p. 630; 108 ALR 1, at p. 33). The reason for requiring a warning differs from category to category. In the case of young children, the reason does not lie in the nature of the offence (see *Reg. v. Pahuja* [1987] 49 SASR 191, at p. 216), but in other considerations. The fact that young children may be under the influence of others and are apt to allow their imaginations to run away with them and to invent untrue stories is one justification which has been advanced (see *Dossi* [1918] 13 Cr. App. R. 158, at p. 161). Again, it has been said that the warning is required in relation to "children who, though old enough to understand the nature of an oath and so competent to give sworn evidence, are yet so young that their comprehension of events and of

questions put to them or their own powers of expression may be imperfect" (see *Director of Public Prosecutions v. Hester* [1973] AC 296, at p. 325. No such reasons were given by the trial Judge for warning the jury that it would be unsafe to convict upon the uncorroborated evidence of the daughter, although the rule of practice that such a warning should be given in relation to the sworn evidence of a young child is, under s. 76F(3)(b) of the Evidence Act unaffected by the abolition by s. 76F(1) of the similar rule of practice in relation to the evidence of complainants in the case of prescribed sexual offences.

Whether a warning was necessary in this case was a matter for the trial Judge, there being no fixed age below which it should be given (see *Reg. v. Morgan* [1978] 1 WLR 735. The trial Judge, in determining whether a warning should be given, was entitled to have regard to the fact that the earliest of the offences with which the applicant was charged was alleged to have occurred when the daughter was 11 years old, notwithstanding that she was 16 years old at the time of the trial. But it seems that the trial Judge regarded the fact that the offences were sexual offences as being the reason for giving the warning which he did, so that he did not turn his mind to those matters which were relevant in deciding whether to give the warning in the case of a young child. And, in giving the warning which he did, the trial Judge would appear to have been in breach of s. 76F(2) of the Evidence Act.

Moreover, in dealing with corroboration in his summing up, the trial Judge appears on occasions to have usurped the jury's function by directing them, not that there was evidence upon which they might find corroboration, but that there was corroboration. For example, he did so in terms which were, to say the least, positive when he said that "(t)he plain evidence from the Accused himself of the prior sexual conduct of which he pleaded guilty is very potent corroboration and very incriminating so far as these present allegations are concerned". But there is, we think, error of a more basic kind in the course adopted by the trial Judge in his summing up.

Evidence of the sexual behaviour of the applicant towards his daughter which culminated in his convictions in 1984 was led by the applicant, but it was led for the limited purpose of establishing a basis upon which he could, by reference to the threats made by the daughter, maintain his defence that her allegations were unfounded. The evidence was admissible for this purpose. It was not otherwise admissible unless it satisfied the stringent test laid down by the law for the admission of what is called compendiously, although in many cases inaccurately, similar fact evidence.

Evidence that an accused has committed offences other than those with which he is charged ought not be admitted if it tends to show only that the Accused has a propensity or disposition to commit criminal offences of a particular type or generally. If a propensity or disposition of that kind is all that the evidence tends to show, then its prejudicial nature must be greater than any relevance which it might have. To admit such evidence would be to invite the jury to proceed upon prejudice or suspicion rather than proof. But if the evidence of other offences goes beyond showing a mere propensity or disposition to commit crime or a particular type of crime and points in some other way to the commission of the offences in question, then it will be admissible if its probative value for that purpose outweighs its prejudicial effect. That is not to say that it may not still be evidence of propensity or disposition, but it will then be evidence of propensity or disposition of a particular kind which in the circumstances has a degree of relevance justifying its admission (see *Thompson v. The Queen* [1989] 169 CLR 1, at pp. 15 - 16; *Harriman v. The Queen* [1989] 167 CLR 590, at pp. 597 - 599.

The additional relevance - or required probative value - may lie in a striking similarity between the previous offences and the offences in question such that they would all appear to be committed by the same person. In that event, evidence of the previous offences is correctly called similar fact evidence. But there are other circumstances, not necessarily involving similarity, in which evidence of the commission of previous offences may have the probative value required for its admission. The relevant circumstances for present purposes occur when the evidence establishes a relationship which is not of an innocent character but points strongly to the commission of the offences in question (see *Harriman v. The Queen* [1989] 167 CLR 590. Thus, in this case, the prosecution might have contended (as the trial Judge recognized) that the evidence of the

commission of the previous offences by the applicant showed that the applicant was sexually attracted to his daughter - a matter which the jury would be entitled to think was abnormal as between a father and daughter - and that he was sexually attracted to his daughter to the extent that he gave physical expression to that attraction. The prosecution might have contended that, in the circumstances, evidence of the existence of that attraction was sufficiently relevant to justify its admission to prove the commission of the offences with which the applicant was charged, notwithstanding the inevitable prejudice which the evidence carried with it. But the prosecution did not so contend and did not attempt to lead evidence of the commission by the applicant of the previous offences. That evidence was led by the defence and for a different purpose. The trial Judge was not asked to rule, nor did he rule, that the evidence was admissible for the purpose of proving a particular propensity or disposition on the part of the Accused pointing to his guilt. The evidence, therefore, remained inadmissible for that purpose. This was not a case in which evidence led for a limited purpose was nevertheless generally admissible. In such a case, the party tendering the evidence cannot limit the use to which the evidence may be put once it is admitted. It was a case in which the evidence in question was not admissible to show propensity until it was led for that purpose and the trial Judge, having applied the appropriate test, ruled that it was admissible for that purpose.

The problem which arises when evidence is admissible for one purpose but is inadmissible for another is well known to the law (see Wigmore on Evidence, rev. ed. [1983], vol. 1, par. 13.

As Tindal CJ said in *Willis v. Bernard* [1832] 8 Bing. 376, at p. 383 (131 ER 439, at p. 441):

> No doubt it renders the administration of justice more difficult when evidence, which is offered for one purpose or person, may incidentally apply to another; but that is an infirmity to which all evidence is subject, and exclusion on such a ground would manifestly occasion greater mischief than the reception of the evidence.

The difficulty is one which the trial Judge must endeavour to overcome. Where, in a criminal case, he admits evidence admissible for one purpose but inadmissible for another - as he is ordinarily bound to do - he should direct the jury that they must not use the evidence for the purpose for which it is inadmissible, particularly where the use of the evidence for that purpose would be adverse to the Accused (see *Donnini v. The Queen* [1972] 128 CLR 114, at p. 123).

In this case, the evidence of the applicant's previous offences was inadmissible if it showed no more than the existence of a criminal propensity or disposition on his part. It would have been admissible if it established the existence of a relationship between the applicant and his daughter which pointed strongly in the direction of his guilt. However, the trial Judge was never called upon to decide whether the evidence had this additional relevance. Had the evidence been tendered for the purpose of proving such a relationship, the onus would have rested upon the prosecution of establishing that the evidence went further than mere propensity or disposition and had an additional probative value which justified its admission despite its prejudicial effect. That question, although a question of degree, is nevertheless a question of law rather than of the exercise of a discretion (see *Director of Public Prosecutions v. Boardman* [1975] AC 421, at p. 457. But that question never arose. Neither the prosecution nor the defence was called upon to argue it.

In these circumstances the trial Judge was in error in directing the jury that the evidence of the applicant's previous offences was capable of amounting to corroboration. On the contrary, he ought to have directed the jury that they should not regard that evidence as tending to show that the applicant committed the offences with which he was charged. The evidence was not tendered for that purpose, it was not admitted for that purpose and could not be used for that purpose. Had the evidence been tendered for that purpose and had the trial Judge determined the question of its admissibility in favour of its admission, the evidence would, no doubt, have been capable of amounting to corroboration (see *McKeon* [1986] 31 A. Crim. R. 357). But it was tendered for a different purpose and the trial Judge ought to have confined its use to that purpose. His failure to do so constituted a fundamental defect in the summing up.

For these reasons we would grant special leave and allow the appeal.